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Supreme Court, U.S.
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No. 98-1298

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT LANDAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1298

QUESTION PRESENTED

Whether, despite his use of drugs and alcohol, petitioner was responsible for paying over to the United States the payroll taxes withheld from the wages of the employees of the company that he owned and served as chief executive officer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 155 F.3d 93. The opinion of the district court (Pet. App. A29-A34) is reported at 956 F. Supp. 1160.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1998. The petition for rehearing was denied on November 19, 1998 (Pet. App. A38). The petition for a writ of certiorari was filed on February 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, petitioner organized a company named Robert Landau Associates, Inc. (RLA) as a marketing and advertising agency to provide promotional and sports licensing services to corporate clients (Pet. App. A4). Petitioner was the sole shareholder, president, and chief executive officer (CEO) of RLA at all times relevant to this case (*ibid.*). In these capacities, petitioner had authority to sign checks, determine the order in which bills would be paid, and negotiate contracts on behalf of the company (*id.* at A6).

Petitioner began using cocaine in 1982. By 1983, his use became an addiction (Pet. 1; Pet. App. A6). During this same period, petitioner was also consuming excessive quantities of alcohol. He nonetheless continued to act as CEO of his company (*id.* at A6, A26). Acting in that capacity during 1984, he sought financing and negotiated contracts on behalf of the company and took numerous business trips to attract new clients (*id.* at A6-A7).

By the end of 1983, petitioner was aware that his company was experiencing severe cash-flow problems (Pet. App. A6). During the first three quarters of 1984, the company failed to remit to the government the federal employment and income taxes that were withheld from the wages of its employees (*id.* at A5-A6). By July 1984, at the latest, petitioner became aware that the company had failed to pay over the withheld taxes to the United States. Although petitioner instructed other officers of the company (including the chief financial officer, Nathan Unger) promptly to pay the withheld taxes, he did not thereafter ensure that the taxes were in fact paid (*id.* at A9-A10).

2. Under Section 6672(a) of the Internal Revenue Code, petitioner and the other officers of the company who were responsible for paying over the withheld taxes to the United States were personally liable for their willful failure to do so. 26 U.S.C. 6672(a). Under this statute, the Internal Revenue Service assessed petitioner and Unger each personally for the amount of taxes ($1,046,376.30) that had been withheld by the company but not paid over to the government (Pet. App. A7). Unger paid part of the assessed amount and sued for a refund in the United States District Court for the Southern District of New York. The United States counterclaimed for the remaining amount of taxes due and named petitioner as a third-party defendant to the action (*ibid.*).

At the trial, petitioner's principal defense was that he was so intoxicated on cocaine and alcohol that he could not understand that the withholding taxes were due or exercise his authority to pay the taxes (Pet. App. A29). The jury entered a verdict in favor of the United States against Unger but against the United States on its counterclaim against petitioner.[1] The jury found that, due to his addiction to drugs and alcohol, petitioner was unable to exercise sufficient control over the company's finances to cause the withheld taxes to be paid to the government (*id.* at A10).

On the government's motion, the district court set aside the jury verdict and entered judgment in the government's favor on its claim against petitioner (Pet. App. A33). The court held that "voluntary intoxication

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[1] The district court set aside the jury verdict against Unger. The court of appeals reversed that order, but remanded the case against Unger for the district court to determine whether he should be granted a new trial (Pet. App. A4, A25).

may not as a matter of law negate an assertion that a person was responsible within the meaning of Section 6672, no matter the extent of that intoxication" (*id.* at A32).

3. The court of appeals affirmed the judgment against petitioner (Pet. App. A1-A28). The court concluded that petitioner's addiction to cocaine and his excessive use of alcohol did not afford him a defense against his liability as a responsible person under Section 6672 (*id.* at A25-A27). The court noted that, during the first three quarters of 1984, while petitioner was engaged in a heavy use of cocaine and alcohol, he continued to function as CEO by obtaining financing and negotiating contracts and taking business trips to promote the company's business (*id.* at A26). In view of the fact that petitioner maintained a significant involvement in business activities during 1984 notwithstanding his excessive use of cocaine and alcohol, the court concluded that petitioner had not established a defense to his legal responsibilities under Section 6672. The court emphasized that, "[t]o permit the CEO and owner of a company, the person with the ultimate authority over the company's financial affairs, to escape liability [under Section 6672] by claiming that he or she was so addicted to cocaine and alcohol as to lack significant control in fact would defeat the purpose of the statute" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 6672(a) of the Internal Revenue Code imposes individual liability upon "[a]ny person required to

collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for, and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof * * *." 26 U.S.C. 6672(a). The persons liable under this Section include any "officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. 6671(b).

The only question raised in the petition is whether petitioner, as the owner and officer of the company, exercised sufficient authority to make him responsible for the collection and payment of withheld taxes.[2] The status, duty, and authority of a corporate employee principally determine whether he is responsible under Section 6672 for paying over withholding taxes to the United States. See, *e.g.*, *Taylor* v. *IRS*, 69 F.3d 411, 416 (10th Cir. 1995); *Fiataruolo* v. *United States*, 8 F.3d 930, 939 (2d Cir. 1993) (quoting *Raba* v. *United States*, 977 F.2d 941, 943 (5th Cir. 1992)). As the court recognized in this case, the focus of the inquiry is on "whether the individual has significant control over the enterprise's finances" (Pet. App. A14). See, *e.g.*, *Greenberg* v. *United States*, 46 F.3d 239, 243 (3d Cir. 1994); *Fiataruolo* v. *United States*, 8 F.3d at 939 (quoting *Hochstein* v. *United States*, 900 F.2d 543, 547 (2d Cir. 1990)). In making this inquiry, courts consider a number of objective factors, such as whether the individual (i) is an officer or member of the board of directors;

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[2] The jury concluded that petitioner acted willfully in failing to pay over the taxes (Pet. App. A10, A26, A31-A32) and that determination is not challenged in the petition.

(ii) owns shares or possesses an entrepreneurial stake in the company; (iii) has the ability to hire and fire employees; (iv) makes decisions regarding which, when, and in what order outstanding debts or taxes will be paid; (v) exercises control over daily bank accounts and disbursement records; and (vi) has check-signing authority. *United States* v. *Rem*, 38 F.3d 634, 642 (2d Cir. 1994); *Bowlen* v. *United States*, 956 F.2d 723, 728 (7th Cir. 1992); *Hochstein* v. *United States*, 900 F.2d at 547; *Barnett* v. *IRS*, 988 F.2d 1449, 1455 (5th Cir.), cert. denied, 510 U.S. 990 (1993). Accord, *Greenberg* v. *United States*, 46 F.3d at 243; *O'Connor* v. *United States*, 956 F.2d 48, 51 (4th Cir. 1992).

The courts below correctly concluded that the facts of this case establish that petitioner had the requisite status, duty, and authority to make him responsible for the payment of withheld taxes. As the court of appeals observed, petitioner, acting as CEO, had "full authority to pay bills, sign checks and negotiate contracts on behalf of RLA during the relevant * * * periods" (Pet. App. 2). During the period at issue, notwithstanding his use of alcohol and cocaine, petitioner continued to act as CEO in all capacities. Petitioner remained actively involved in obtaining financing and negotiating contracts on behalf of RLA and in promoting the company and attracting new clients (*id.* at A6). On the specific facts of this case, which revealed petitioner's continued extensive involvement and control over the company's finances, the court of appeals correctly rejected the contention that petitioner's use of alcohol and drugs negated his responsibility to pay over to the government withheld taxes (*id.* at A26).

2. The conclusion in this case that the liability to make the payments required by Section 6672 attaches to the authority to make such payments, even if that

authority is not effectively exercised by the defendant, is consistent with the holding of numerous other courts. See, *e.g.*, *Barnett* v. *IRS*, 988 F.2d at 1454-1455 ("[u]nlike the willfulness element of the statute, responsibility does not require knowledge that one has that duty and authority"); *Greenberg* v. *United States*, 46 F.3d at 243; *Denbo* v. *United States*, 988 F.2d 1029, 1033 (10th Cir. 1993); *Hochstein* v. *United States*, 900 F.2d at 547; *Ruth* v. *United States*, 823 F.2d 1091, 1094 (7th Cir. 1987).

Petitioner erroneously contends (Pet. 12-13, 16-17, 20-21) that the decision in this case conflicts with language in this Court's opinion in *Slodov* v. *United States*, 436 U.S. 238, 254 (1978). In particular, petitioner maintains (Pet. 12) that imposing liability on him under Section 6672, notwithstanding his excessive use of alcohol and cocaine, is inconsistent with the statement in *Slodov* that Section 6672 "was not intended to impose liability without personal fault." 436 U.S. at 254.

Petitioner errs in relying on *Slodov*. In that case, the Court addressed the liability of an individual who first became responsible for a corporation's withholding taxes after prior management had used the fund represented by those taxes to pay other creditors and had left the corporation with no unencumbered funds to pay the taxes. The Court held that the new owner of the company was not personally liable to assure payment of the tax obligations that accrued before he became owner. 436 U.S. at 259-260. That holding does not aid petitioner in this case. Petitioner has not argued, and the record does not suggest, that he was not the CEO at all relevant times. Unlike in *Slodov*, no liability has been imposed on petitioner for periods in which he did not serve as a responsible officer.

Moreover, *Slodov* does not purport to address the liability (or personal fault) of a corporate officer who, while intoxicated from alcohol and drugs, fails to pay over withholding taxes. The holding in *Slodov* is thus plainly not applicable to the wholly different facts of this case.

3. Petitioner further errs in arguing (Pet. 14-26) that the decision in this case conflicts with the holdings of other circuits. Indeed, as petitioner elsewhere candidly acknowledges, "[n]o other circuit appears to have considered the precise issue at bar" (Pet. 12). Moreover, in analogous contexts, courts have held that cocaine addiction is not a viable defense to civil sanctions imposed for willful misconduct. See *In re Berzon*, 145 B.R. 247, 251 (Bankr. N.D. Ill. 1992) (debtor's cocaine habit did not preclude finding of willful failure to file tax returns); *In re Correa*, 58 B.R. 88, 90-91 (Bankr. N.D. Ill. 1986) (debtor's failure to attend creditors' meetings and to disclose financial information constituted willful failure to comply with court orders despite cocaine addiction).

The appellate decisions that petitioner cites (Pet. 15-18) do not conflict with the decision in this case. While the courts in the cited cases indicate that a determination of responsible person status is factual and is based on the totality of circumstances, the only indicia of responsible person status addressed in those decisions are objective factors relating to an individual's status, duty, and authority to pay withholding taxes on behalf of a corporation. See, *e.g.*, *Bowlen* v. *United States*, 956 F.2d at 728; *O'Connor* v. *United States*, 956 F.2d at 51; *Purcell* v. *United States*, 1 F.3d 932, 937 (9th Cir. 1993); *Gephart* v. *United States*, 818 F.2d 469, 473 (6th Cir. 1987); *United States* v. *Rem*, 38 F.3d at 642; *Raba* v. *United States*, 977 F.2d at 943. These courts do

not suggest, much less hold, that a condition caused by an individual's own actions, such as voluntary intoxication, can negate his status as a responsible person.[3] There is thus no conflict among the circuits on the factually distinct issue presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The two trial court decisions cited by petitioner that held that persons with particular physical ailments were not responsible persons under Section 6672 (Pet. 21-22 (citing *Young* v. *United States*, 609 F. Supp. 512 (N.D. Tex. 1985); *Sherwood* v. *United States*, 246 F. Supp. 502 (E.D.N.Y. 1965))) are also inapposite. As the court of appeals explained, whereas the physical ailments involved in those cases arose from circumstances beyond the control of the corporate officers, "a voluntary decision to use narcotics and alcohol" does not "justify or excuse [the] failure to remit the [withheld] taxes" by a person who retained the status and authority to do so (Pet. App. A27).